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Supreme Court of the United States

October Term, 1979
No. 79-602

DONALD W. AGINS AND BONNIE G. AGINS,
Appellants,

vs.

CITY OF TIBURON,
Appellee.

On Appeal From the Supreme Court of California.

BRIEF OF AMICI CURIAE FEDERATION OF HILLSIDE AND CANYON ASSOCIATIONS, INC. AND BRENTWOOD COMMUNITY FEDERATION IN SUPPORT OF APPELLEE, CITY OF TIBURON.

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AMICI CURIAE.

Amici curiae are two federations of homeowners' organizations which represent residents in the Santa Monica Mountains of Los Angeles. The Federation of Hillside and Canyon Associations, Inc. includes the following: Bel-Air Association, Benedict Canyon Association, Briarcliff Homeowners' Association, Cahuenga Pass Property Owners' Association, Canyon Drive Homeowners' Association, Casiano Homeowners' Association, Curson Canyon Homeowners' Association, Encino Property Owners' Association, Hollywood-Crescent Homeowners' Association, Hollywood-Dell Homeowners' Association, Hollywood Knolls Homeowners' Association, Hollywoodland Improvement Association, Hollywood Manor Homeowners' Association, Lake Hollywood Homeowners' Association, Laurel Canyon Association, Laurel Hills Homeowners' Association, Lookout Mountain Associates, Maybrook Homeowners' Association, Mount Olympus Homeowners' Association, Mount Washington Homeowners' Association, Mountain Area Protective Society, Mulholland Property Owners' Association, Nichols Canyon Property Owners' Association, Outpost Homeowners' Association, Residents of Beverly Glen, Roscomare Valley Association, Sherman Oaks Property Owners' Association, Studio City Homeowners' Association, Tarzana Property Owners' Association, Whitley Heights Homeowners' Association, and Woodland Hills Residents' Association. The Brentwood Community Federation includes: Brentwood Hills Association, Brentwood Homeowners' Association, Brentwood Terrace Homeowners' Association, Crestwood Hills Association, Mandeville Canyon Association, South Brentwood Association, Sullivan Canyon Association, and Upper Mandeville Canyon Association. In addition, two homeowners' associations, Bel-Air Knolls and Bel-Air Skycrest Associations, are members

of both federations, because their geographical representation overlaps jurisdictional lines.

Counsel for both parties have granted consent to submission of this brief pursuant to Supreme Court Rule 42. The original letters of consent have been lodged with the Clerk of this Court.

I
INTRODUCTION.

Amici are two federations of homeowners' associations that span the Santa Monica Mountains in the City of Los Angeles. They are filing this brief because they believe that their concerns have not yet been presented to this court.

They represent the members of the public—citizens, homeowners, residents and taxpayers—who are directly impacted by the land use controls imposed by government. They contend that the appropriate use of land is a matter of essential public concern and that the determination of land use is a public process, which process will be essentially compromised by acceptance of Appellants' contention that development rights are compensable when the government regulates land.

Amici wish to bring to the attention of the Court their contentions that determination of reasonable restrictions on land use depends on the nature of the land to be developed and the carrying capacity of the land. They suggest that a legislative body may reasonably conclude that, under given circumstances, it would be more detrimental than beneficial to permit development of marginal land.

They do not accept the basic premise of Appellants that profit in the sale of land is of a Constitutionally protected dimension. Rather, *amici* assert that the right to develop land must be balanced by the right not to be injured.

The government is the scale that weighs the potential benefit of development against its potential for harm. It is to present a counter-balance to the interests of the merchants of land that citizen *amici* have sought leave to file this brief.

Specifically, *amici* will argue:

- The use and development of land is a public issue. Public input is essential to determination of appropriate land use. This input is lost by Appellants' strategy of direct appeal to the Courts.
- Failure to exhaust administrative remedies prior to initiation of an inverse condemnation action deprives citizens of their vital right to be involved and heard in land use decisions which directly affect them.
- With undeveloped land, failure to secure a governmental determination of reasonable density before initiating an inverse condemnation action deprives the judiciary of the necessary facts concerning the character of the land, the reasonableness of the regulation, and the realistic market value of the land.
- Development rights are not compensable under the just compensation clause.
- The speculative fair market value of undeveloped land provides an inflated measure of damages in an inverse condemnation action.

II
INTEREST OF AMICI.

Amici associations are made up of citizens who live in the urbanized hillside, canyon and mountaintop communities of the Santa Monica Mountains in Los Angeles. Their interest in the consequences of expedient, massive, unthinking and unsound development in fragile geographic areas is both direct and personal. Development of hillsides unsuitable for homes may pose a danger to life and property to adjacent communities.

The Court is asked to take judicial notice of the fact that twice within the past two years (February/March, 1978 and February, 1980), the hillsides and canyons of Los Angeles have been devastated when heavy rains brought flooding, landslides and mudslides resulting in massive damage to hillside homes and injury and death to their occupants. The

damages were, in part, a result of land use decisions made in years past. The catastrophic effect of those earlier decisions is irreversible; future land use decisions, made without full disclosure of the inherent limitations of the land and without full consideration of the potential impact on the surrounding community, will likewise be irreversible.

Amici have a two-fold experience in the local land use planning and decision-making process.

They have played a vital role as community advocates when individual development plans have been considered by local government, reminding cities and counties of the specific needs of their communities and have publicly debated the wisdom of allowing maximum development density in areas where the resulting hazards to life and property might be considerable. Their right to review and be heard on land use applications is both recognized and required by the California planning and zoning codes and the Los Angeles Municipal Code. *California Government Code §66451, §66452.5* and *Los Angeles Municipal Code §17.00 et seq.*

Amici have also served as citizen lobbyists to secure needed land use regulations. The regulations they have proposed were often resisted initially by local government where such regulations have had the effect of restricting maximum density of development.

They were, for example, influential in promoting the revision of the Los Angeles grading ordinances, which both the City and the developers now look to with pride. Their members have actively worked on the Citizens' Advisory Committees that provided the necessary input in the creation of the hillside Community Plans that form an integral part of the Los Angeles General Plan. Many of their members have served on these Citizens' Advisory Committees and have successfully included a slope/density ordinance in their

Community Plans that limits density in the hillsides in direct ratio to the steepness of the natural slope.

The slope/density formula is particularly applicable to considerations of the issue in the present action, because it is representative of planning that severely restricts density (and, arguably, the marketability of land) and is, at the same time, a reasonable exercise of the police power.

The rationale underlying slope/density is that there is a reasonable relation between the steepness of the natural slopes in the hillsides and the carrying capacity of the land. That is, for example, the steeper the slopes, the more inaccessible the terrain, the greater the difficulty in providing fire protection in narrow, winding mountain streets. And, as another example, the more inaccessible the streets, the greater the cost of providing police protection. And, the steeper the slope, the greater the threat of flooding and mudslides.

These are among the considerations that led to density limitations that restrict density to as little as one dwelling unit to twenty acres in the steepest parts of the mountains (where the slopes are greater than thirty-five per cent).

The formula is presently being tested in an inverse condemnation action by the owner of an estate in Benedict Canyon in *Kollsman v. The City of Los Angeles* (United States District Court, Central District of Los Angeles, Number CV 77 0770 ALS) without any determination by the subdivision process. In that action, the developer claims that his property has been taken, because the engineering costs of development result in a negative value to his land unless he is given permission to build a greater number of dwelling units than that permitted under the slope/density formula.

In other words, the more marginal the land, the greater the density he must be permitted because of the expenses of site preparation.

That action is presently pending. *Amici* believe that the decision of this Court will directly affect the action below. It is for these reasons that *amici* believe that they are directly affected by the present appeal.

III

THE USE AND DEVELOPMENT OF LAND IS A PUBLIC ISSUE. PUBLIC INPUT IS ESSENTIAL TO DETERMINATION OF APPROPRIATE LAND USE.

Land is a public issue. As the California Legislature declared in enacting the *State Subdivision Map Act:*

> ". . . California's land is an exhaustible resource, not just a commodity, and is essential to the economy, environment and general well-being of the people of California. It is the policy of the state and the interest of the Legislature to protect California's land resource, to insure its preservation and use in ways which are economically and socially desirable in an attempt to improve the quality of life in California." *California Government Code* §65030.

Property rights do not confer upon the owner of land the absolute right to do what he wants with his land. Historically, the right of an owner to use or develop land to his own economic advantage was deemed subordinate to the rights of the community to be protected from unhealthful, unsafe or burdensome consequences of land use. The common law of nuisance, zoning law, and modern land use regulations have all developed from the fundamental premise that property rights are enjoyed under an implied limitation and must yield to the police power where the environmental, social, and economic well-being of the citizenry

is at stake. *H.F.H. Ltd. v. Superior Court,* 15 Cal.3d 508, 125 Cal.Rptr. 365, 542 P.2d 237 (1975), cert. denied 425 U.S. 904, citing *Carter v. Harper,* 182 Wis. 148, 153 (1923); *Pennsylvania Coal Company v. Mahon,* 260 U.S. 393 (1922); *Euclid v. Ambler Realty Company,* 272 U.S. 365 (1926); *Sierra Club v. Morton,* 405 U.S. 727 (1972).

The planning laws of the State and the requirements of local ordinance delineate the process by which the appropriate use of land is determined in California.

California State law mandates that local entities approve a General Plan (*California Government Code* §65300 *et seq.*). Public input is required (*California Government Code* §65304, §65351, §65355, §65356.1).

State law mandates consideration of the environmental impact of land use decisions. The authorized body must seek comment and review, as well as hold public hearings to determine that impact. *California Public Resources Code* §21000 *et seq.*

Zoning and subdivision procedures require public hearings and make provisions for appeals to the legislative body by citizens, as well as applicants, who are dissatisfied with the determinations made at the administrative level of government. *California Government Code* §66451, §66452.5; *Los Angeles Municipal Code* §17.00 *et seq.*

The public input in land planning is imbedded in the process of land use determinations in California.

IV

FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES PRIOR TO INITIATION OF AN INVERSE CONDEMNATION ACTION DEPRIVES CITIZENS OF THEIR VITAL RIGHT TO BE INVOLVED AND HEARD IN LAND USE DECISIONS WHICH DIRECTLY AFFECT THEM.

Amici have learned from long experience in the local land use decision-making process that without public input, cities

and counties respond to political pressure to increase the intensity of land use rather than to restrict its use. Absent citizen review and public hearings, there exists no imperative to give full consideration to the particular problems caused or exacerbated by a proposed development, nor to consider the cumulative impact of the development upon the surrounding communities. Public input is vital to the process in order to determine whether there exist public exigencies justifying restrictions on development rights.

The *Agins'* inverse condemnation strategy effectively eliminates all such citizen involvement and public dialogue.

In *Agins*, the owners of property have resorted to the judicial process directly instead of securing a governmental determination as to the density of permitted development on their land. As a result, no consideration was ever given to determination of the impact development would have on the surrounding community, nor was there any public debate over the appropriateness of any particular proposal.

As Justice Marshall noted in his dissent in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 14 (1974), land use regulations are complex, important, and essential to the quality of life in every community. They are the means whereby local governments insure that our cities and towns remain fit for humans to live in. It is public debate which shapes the determination ultimately reached by government as to what development of the land is reasonable under the circumstances. Such public debate is vital inasmuch as land use decisions have an irreversible, cumulative impact upon the community. With vacant land, the determination to change the nature of the property is irreversible.

By circumventing the requirement for a development proposal under the *State Subdivision Map Act* (*California Government Code* §66410, *et seq*. and appealing directly to the

judiciary for a determination that development rights have been "taken" within the meaning of the Fifth Amendment, *Agins* has eliminated the right of the public to be involved in the crucial, initial stage of the land use decision-making process.

It has also avoided the necessity for conforming to the separate environmental procedures mandated by State law (*California Environmental Quality Act, Public Resources Code* §21000 *et seq*.), the very purpose of which is to identify environmental consequences of the proposed development which may significantly affect the environment and to require mitigation measures at the proposal stages.

Immediate recourse to the courts would effectively eliminate citizen input. City and county halls are the only accessible forums for citizens seeking to be heard on individual land use matters which may directly affect them. Land use litigation is expensive, protracted, and discouraging, Citizen groups simply cannot garner the finances to intervene in case by case adjudications involving challenges to land use regulations. They cannot write off their litigation costs as a business risk, as can Appellants and their *amici* Nor can they pass on their costs to the public through demands on the public treasury, as can Appellees. They are dependent on the administrative process for consideration of their legitimate claims.

Unless the *Agins* inverse condemnation strategy is repudiated by this Court and exhaustion of administrative remedies is deemed vital to the continuing right of citizens to be publicly involved in local land use decisions, the role of the public in future land use decisions will be minimal.

Under threat of inverse condemnation, local governments, lacking the financial resources to regulate by purchase, will rarely be willing to offer resistance, but will find it more feasible to capitulate and permit a developer

to develop land to his own economic advantage no matter what the impact upon the citizenry and ultimately upon the city. Public dialogue will no longer serve as an effective counter-balance to the rights claimed by developers.

Eliminating citizen involvement and eliminating an administrative record by directly invoking the judicial process allows only one dominant view to be placed before the courts—the view that the right to exploit land for profit is inevitably in the public interest. *Amici* maintain that the question of whether the use and development of land is compatible with the natural carrying capacity of the land and the surrounding community is a public issue of such importance that public involvement should be required at the administrative level before the judicial process may be invoked.

V

WITH UNDEVELOPED LAND, FAILURE TO SECURE A GOVERNMENT DETERMINATION OF REASONABLE DENSITY BEFORE INITIATING AN INVERSE CONDEMNATION ACTION DEPRIVES THE JUDICIARY OF THE NECESSARY FACTS CONCERNING THE CHARACTER OF THE LAND, THE REASONABLENESS OF THE REGULATION, AND THE REALISTIC MARKET VALUE OF THE LAND.

A. Land Is Both a Resource and a Commodity.

When an owner makes the decision to convert undeveloped land from a marketable commodity into a developed resource, his use of his land becomes subject to the reasonable exercise of the police power.

Land is a commodity only for the purposes of valuation in the market place. In societal terms, land is a finite resource for which the range of allowable density of development, in order not to be injurious to the community, must

be compatible with the natural carrying capacity of the land itself, adjacent lands, and available public resources.

By invoking judicial relief directly, Agins' right to develop land to his own economic advantage is considered in the abstract as though his land were merely a private commodity.

Amici ask this Court to note that there is a basic two-fold assumption in all of the briefs filed in support of Appellants that *amici* contend is in error. It is the assumption that all unimproved land may be improved to a higher intensity and that higher intensity use will always result in a social good.

The *Agins'* argument assumes that land remains a commodity when it is developed; that future development transactions affecting land are private transactions; that the purpose of exploiting land is to maximize profit in accordance with the principles of a free market economy; that public expectations and governmental restrictions concerning the use and development of land are an interference with the profit expectations of the owner; and that restrictions imposed which curtail development rights, whether reasonable or unreasonable, are a taking of the development potential that cannot be realized in the market place. It is for the loss of that development potential that Appellants seek just compensation under the Constitution.

If improving land to a higher intensity use always resulted in a social good, as Appellants maintain, planning laws would not be necessary. Rather, they would create arbitrary and capricious obstacles to the process by which land is continuously improved to its highest and best use.

Ideally, what the market place strives for—the intensification of land use and the creation of capital—the planning process resists at the point at which local government de-

termines that a proposed development will result in identifiable social harm rather than social good.

A governmental determination that a particular development is more burdensome than beneficial may be based on knowledge that was not available to it in past times. Its assessment of the impact of development depends on the level of knowledge of the society it represents. Societal concepts of what is harmful become more sophisticated as communal wisdom increases. As Curtis Berger has said,

> "(As) our scientific and technological understanding expands, we find that activities once thought innocent may cause incalculable harm." Curtis Berger, *The Accommodation Power in Land Use Controversies: A Reply to Professor Costonis*, 76 Colum.L.Rev. 799, note 5 at 823 (1976).

The Agins' action seeks to hold the local legislature liable for a change in its perception of public interest. In dealing with the important issue of State liability for repeal of emission control legislation which resulted in market loss to the manufacturer of smog control devices, the California Second District Court of Appeal has just considered the issue and has unequivocally stated:

> "A Legislature is not liable, nor is the State liable, for a change in its perception of public interest. Many things once thought desirable, or even to be encouraged, are later thought to be undesirable and to be discouraged. An investment under the earlier legislation is not protected against a change in the Legislature's views of desirability." (*Dana Corporation, et al. v. State of California*, 80 Daily Journal D.A.R. 743 (C.A. 2nd, March 13, 1980).

While local governmental determinations respecting land may be imperfect and imprecise, it is the legislature which

must first determine that, for example, the harm resulting from traffic congestion and fire danger in the steep hillsides and canyons where *amici* reside, or the negative impact on the city treasury which may result from providing public services needed by the proposed development, outweighs the benefits of permitting the building of the number of new homes required to insure a profit to the developer who proposes to build them.

The local land use process is a means whereby the private expectations of the developer are reconciled with the public expectations concerning reasonable land use. At that point, the owner's development rights are established in relation to the society as a whole.

It is the intersection of private enterprise, driven by the desire for profit, with local government, motivated by political considerations, which allows for harmonizing development rights with the public good. That balancing process is lost when the developer appeals directly to the judiciary to determine in the abstract whether all or part of his anticipated development rights have been "taken".

Development of land is a public issue. Important questions of public policy permeate every decision regarding the use of land, because the decision has direct and measurable impact upon citizens adjacent to the development and upon the quality of life for the entire community. *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978).

B. In Order to Determine Whether the Regulation Is Reasonable, the Character of the Regulation Must Be Evaluated In Light of the Carrying Capacity of the Land to Be Developed.

Land use regulations must be considered in connection with the circumstances and the locality in order to determine

whether the police power has been properly exercised. *Euclid v. Ambler Realty Company*, 272 U.S. 365, 388 (1926).

Appellants are asking the judiciary to supplant the governmental decision process and to determine, preliminarily, whether development expectations of the Appellants are compensable without a determination of whether such expectations are reasonable in light of the development capability of the land and the impact upon the surrounding communities.

In order for the judiciary to make such a determination, the land use allocation actually established for Appellants' property must be known. Under the zoning applicable to Appellants' property, one dwelling unit per acre may be permitted, but since there is no development plan on record, the Court cannot determine whether that density would be appropriate for the property.

Of crucial significance to the validity of Appellants' claim is the disclosure of the character of the land and the development density desired by the developer. The record before this Court merely discloses that Appellants' land lies in a hillside area; natural conditions on the land which would inhibit development are not disclosed. Until the subdivision application is processed, the Court cannot determine whether it is the regulation or the land itself which restricts development.

It is reasonable for government to impose stringent land use regulations on land that is of marginal quality and hazardous to develop. Where the character of the land in its natural state has been unuseable for generations because it is precipitous, hilly, rocky and brush-covered, where extensive grading is necessary, where traffic access is severely limited, where fire hazards are high, and where the availability of public services is difficult and expensive to provide, lesser density is often compelled by the circumstances.

Where the nature of the land so dictates, the conflict between the goals of the market place and the community become most pronounced. On the one hand, environmental, social, and economic factors militate against permitting maximum development of marginal land. On the other hand, to the developer, the marginal nature of the land will mean that the development costs will be much greater.

By exercising an inverse condemnation strategy without exhaustion of administrative remedies, a determination as to what development potential of the land is reasonable under the circumstances is not known. If the restriction does, indeed, substantially affect the market price of the land, the effect may be due to discovery of the inherent limitations of the land itself. The regulation may be compelled by the nature of the land and the need to protect the public and the public fisc.

The right to exercise the police powers that reasonably restrict realization of market potential has long been recognized by the judiciary.

In *City of Walnut Creek v. Leadership Housing Systems, Inc.*, 73 Cal.App.3d 611, 140 Cal.Rptr. 690 (1977), the owner of 134 acres of hillside land applied for a development permit that would permit a maximum of 139 dwelling units on 39 acres of the property. The City turned down the permit on the grounds that the significant hazards posed by the development included: extensive grading, inadequate access to proposed open-space areas, potential slide hazard areas, and increased traffic on roads already at over-capacity. The judiciary, in upholding the City's determination, was apprised of the unique features of the land. It was therefore aware that denial of the proposed development was not unreasonable given the natural features of the land.

In *Metro Realty v. County of El Dorado*, 222 Cal.App.2d 508, 35 Cal.Rptr. 480 (1963), the issue was whether a county could impose á three-year moratorium on the development of land in an area designated for reservoir use. The developer had filed a subdivision map application requesting single family residential development for the property. The Court reviewed the administrative records and concluded that the regulation was reasonable because

> "(1) plaintiff is not being singled out as a lonely object of regulation. The ordinance affects *all* new would be homes subdividers within 31 potential reservoir sites spread throughout the entire county; also (2) the lands here involved have been unused and unuseable for generations. They are precipitous or hilly; rocky, brush-covered; (3) there are no subdivisions in the immediate vicinity. An attempt to launch a home site development on plaintiff's land would be a pioneering adventure." *Id.* at 513.

These cases establish that whether a regulation can prohibit a development is directly dependent on the determination of whether the land will accommodate the development proposed.

C. Economic Loss as Measured by Fair Market Value for Undeveloped Land Cannot Be Determined Until the Public Process Has Revealed the Actual Development Potential of the Land.

The fair market value of undeveloped land, where there has been no governmental determination respecting its reasonable use, includes an economic potential for development that may not be realistic. This is so because although the value of land as a commodity increases as the land available for building becomes more scarce, the value of the land determined in accordance with the development

permitted under applicable regulations may be significantly less.

Prior to the time that application to develop vacant land is made to local government, the fair market value of the land is determined in the abstract. The value may reflect existing zoning (which may or may not be realistic) and the probability of a zone change, but the value may not reflect unknown impediments to development. These may be discovered only when application for a subdivision is processed. The limitations of development potential may be either inherent frailties in the land itself or may result from the impact of development on the surrounding community.

It is only once a determination has been made as to whether the land is reasonably suited for the density of development proposed, after such factors are considered as ecological necessity, location and availability of roads and public utilities, impact upon surrounding communities, and economic facts of significance to government as well as the developer, that the land assumes a fair market value which accurately reflects its development potential.

By bypassing a governmental determination, Appellants claim a speculative measure of damages which may or may not be realistic. Absent the administrative record, the judiciary is unable to ascertain whether the measure of damages is reasonable, because the market value of the land as determined by appraisal before the inherent limitations have been discovered and publicly debated may be different than the appraisal value that could be calculated after full disclosure of the realistic development potential of the land.

In *Village of Belle Terre v. Boraas*, 416 U.S. 1, 14 (1974), Justice Marshall noted in his dissent that the judiciary should resist the opportunity to sit as a Board of Zoning Appeals in reviewing governmental judgments concerning

land use allocations so as not to impede local governments from devising effective land use controls in the future.

Today, Appellants would urge that the judiciary recognize an inverse condemnation action which involves complex land use regulations without first allowing local government (and its citizenry) to determine what the appropriate land use allocation should be in light of all the particular circumstances surrounding the proposed development. The judiciary is being asked not to sit as a Board of Zoning Appeals, but rather to supplant itself for the local legislature by determining that there is a minimum density that can be assigned to the Agins' property below which the local entity may not limit the Agins without providing them with a cash outlay from the public treasury.

As Justice Rehnquist reaffirmed in *Kaiser Aetna v. United States* (.... U.S. ...., 100 S.Ct. 383, 391 (1979)): ". . . The life of the law has not been logic, it has been experience.", citing Justice Holmes.

Experience rather than logic of law evolves from a weighing of the facts of each particular case. By invoking an inverse condemnation action directly without an administrative record to establish the essential facts, Appellants seek a judicial determination which is based solely on abstract principles of law.

The distinction is especially critical in the land use context. Local land use regulation viewed in the abstract is general and theoretical. The land use process works only when decisions are made on individual facts by local government determined in light of experience with such

> ". . . unanticipated and often unforeseeable events (such as): social and political changes, ecological necessity, location and availability of roads and utilities, economic facts (especially costs of construction and financing), governmental needs, and as important as any, market and consumer choice." Dissent of Justice Powell in *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 682, n.3, citing *Kropf v. City of Sterling Heights*, 391 Mich. 139, 168, 215 N.W.2d 179, 191-192 (1974).

In order for the local land use process to work, it must first be invoked. Local government then has an opportunity to apply its experience to the facts. Following a local governmental determination concerning the magnitude of the proposed development, the applicant will resort to the judicial process for redress, if necessary. The judiciary, as the final arbiter on the question of whether the land use allocation to the developer was reasonable, has the experience of all of the affected parties, including the citizenry, contained in the record before it as the basis for applying the law.

That is the law of experience, which *amici* respectfully asks this Court to uphold.

VI

DEVELOPMENT RIGHTS ARE NOT COMPENSABLE UNDER THE JUST COMPENSATION CLAUSE.

A. General Plans and Zoning Laws Do Not Give Rise to Inverse Condemnation Actions.

Land use designations under the planning and zoning laws are comprehensive, long-range planning controls enacted by local government in response to foreseeable community needs. Unforeseeable future changes in the community will likewise necessitate changes in the regulations enacted.

> "Legally, all zoning enabling acts contemplate the possibility of dezoning, the power to amend zoning ordinances serving that purpose. The provisions do not

show in their face whether they are intended to remedy particular errors or hardships, or whether they contemplate readjustments called for by the changing character of neighborhoods; undoubtedly, however, they may be made available for either purpose." *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 682, n.3 (1976), citing Freund, *Some Inadequately Discussed Problems of the Law of City Planning and Zoning*, 24 Ill.L.Rev., 135, 145 (1929).

Where there has been no conduct of any public agency which has directly interfered with the owner's use of the property, any impact upon the property resulting from general land use regulations is non-compensable. *H.F.H., Ltd. v. Superior Court*, 15 Cal.3d 508, 125 Cal.Rptr. 365, 542 P.2d 237 (1975); *Selby Realty Company v. City of Buenaventura*, 10 Cal.3d 110, 109 Cal. 799, 514 P.2d 111 (1973); *People Ex Rel. Department of Public Works v. Peninsula Enterprises, Inc.*, 91 Cal.App.3d 332, 153 Cal.Rptr. 895 (1979); *Friedman v. City of Fairfax*, 81 Cal.App.3d 667, 146 Cal.Rptr. 687 (1978); *Smith v. State of California*, 50 Cal.App.3d 529, 123 Cal.Rptr. 745 (1975).

Moreover, land use regulations which impose a temporary moratorium on development in particular areas and which affect all property owners similarly have been consistently upheld by California courts on the theory that the right to develop land is subject to the rights of society to have a reasonable opportunity to develop solutions to substantial social, economic and environmental problems posed by development in certain areas. *Avco Community Developers, Inc. v. South Coast Regional Commission*, 17 Cal.3d 785, 800-802, 132 Cal.Rptr. 386, 553 P.2d 546 (1976); *State of California v. Superior Court* (*Veta Company*), 12 Cal.3d 237, 252-255, 115 Cal.Rptr. 497, 524 P.2d 1281 (1974).

Under the authority of the preceding cases, any impact upon Appellants' property resulting from the general land use controls adopted by the City of Tiburon does not give rise to an inverse condemnation action because it does not interfere with the use to which Appellants are presently devoting their property.

Finally, it must be noted that land use restrictions, by their nature, are temporary. They may be changed, upward or downward, depending on the technological accomplishments of the society, the needs of the community, and the knowledge of the decision-makers. Compensation for a reasonable change in regulations would provide an unwarranted windfall for those who speculate in land.

As the California Supreme Court stated in *H.F.H., Ltd. v. Superior Court*, 15 Cal.3d 508, 125 Cal.Rptr. 365, 542 P.2d 237 (1975),

". . . (Z)oning is not an arbitrary action depriving someone of property for the purpose of its use by the public or transfer to another; rather it involves reciprocal benefits and burdens which the circumstances of this case well illustrate. The shopping center which plaintiffs seem at various times to have contemplated erecting, would derive its value from the existence of residential housing in the surrounding area. That residential character of the neighborhood, we may assume, results in part from the residential zoning of the area around the tract in question. As one of the plaintiff's amici has written in another context, '(W)hile one can conceptually separate windfalls caused by government (e.g., by zoning actions) from those caused by the community, they are very hard to disentangle and measure.' " *Id.* at 520-521, citing Hagman, *A New Deal: Trading Windfalls for Wipeouts* (1974), 40 Planning 9.

B. Development Rights Are Not Cognizable at Law Until Such Time as a Property Owner Has Secured a Governmental Determination That He Is Entitled to Reasonably Adapt His Property to an Expanded Use and Until He Has Been Granted the Applicable Governmental Permit.

Development rights are one species of economic interests. They may be actual (*e.g.*, reasonably bound up with existing utilization of land—as where an owner has instituted a use on the property or has secured a building permit and commenced improvements) or they may be speculative (*e.g.*, based upon the highest and best use of the land as a commodity in accordance with fair market value principles). *Amici* maintain that only presently used development rights are considered property for purposes of determining whether at some point a regulation may constitute a "taking".

In *United States v. Willow River Company*, 324 U.S. 499, 502 (1945), this Court emphasized that:

> ". . . (N)ot all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them and only when they are so recognized may courts compel others to forebear from interfering with them or to compensate for their invasion."

With undeveloped land, Appellants have no right to rely on existing zoning:

> "A property owner acquires no vested right as against future zoning merely by purchasing real property (*Anderson vs. City Council* (1964), 229 Cal.App.2d 79 (40 Cal.Rptr. 41)), and by zoning the property the government makes no representation to the landowner that he will be exempt from the zoning laws in effect at the time he applies for his permit. (*Avco Community Developers, Inc. vs. South Coast Regional Com.* (1976), 17 Cal.3d 785 (132 Cal.Rptr. 386, 553 P.2d 546)." *Toso v. City of Santa Barbara*, 80 Cal.App.3d 664, 665, ... Cal.Rptr. .... (1979).

Appellants' development rights, with respect to undeveloped land for which no governmental permit has been secured, consists merely of the right to continue a use already instituted, not to capitalize an anticipated profit. *Anderson v. City Council*, 299 Cal.App.2d 79, 40 Cal.Rptr. 41 (1964); *Brown v. City of Fremont*, 75 Cal.App.3d 141, 147, 142 Cal.Rptr. 46 (1977).

Appellants have not raised a cognizable "taking" claim simply by alleging loss of speculative development rights. In *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 130 (1978) this Court stated:

> ". . . (T)he submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable."

In previous cases this Court has recognized inverse condemnation actions involving injury to development rights only where the economic interests are tied to a use already instituted on the property. *Penn Central Transportation Company v. City of New York, supra; Kaiser Aetna v. United States*, ... U.S. ...., 100 S.Ct. 383 (1979); *Andrus v. Allard*, ... U.S. ...., 100 S.Ct. 318 (1979) (economic interests as related to commercial goods already in existence). In each of those cases, the economic interests were considered "sufficiently bound up with the reasonable expectations of the claimant so as to constitute 'property' for Fifth Amendment purposes." *Penn Central Transportation Company v. City of New York, supra*, at 125.

The economic interests (and resulting injuries claimed) were insufficient, standing alone, to constitute cognizable property interests under the Fifth Amendment for which just compensation was required. It was only where the economic interests were coupled with the property right deemed more fundamental under the Constitution — the "right to exclude others" from interfering with an existing use of the property — where just compensation was required. *Kaiser Aetna v. United States, supra*. See also *United States v. Causby*, 328 U.S. 256 (1946) (governmental taking of an air easement compels just compensation.)

Where the government takes land under the eminent domain power, speculative development rights are not cognizable.

In *United States v. Twin City Power Company*, 350 U.S. 222 (1956), the government was not required to compensate the land owner when it acquired fast lands to improve navigation for certain elements of damage attributable to riparian location, such as the land's value as a hydroelectric site.

Nor in *United States v. Rands*, 389 U.S. 121 (1967), was the government required to compensate the land owner for the land's potential as a port site.

All that the Fifth Amendment requires is a "full and perfect equivalent for the property taken". *Monogahela Navigation Company v. U.S.*, 148 U.S. 312, 326 (1893).

This Court has held that restrictions on development rights, such as building on portions of property deemed unsuitable, goes fundamentally to the heart of the police power without giving rise to an inverse condemnation action. *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Welch v. Swasey*, 214 U.S. 91 (1909) (height restriction); *Gorieb*

v. Fox, 274 U.S. 603 (1927) (requirement that portions of parcels be left unbuilt).

Moreover, where the anticipated use of the property would inflict injury upon the community, partial or total curtailment of the use being made on the real property has likewise been sustained under the police power without giving rise to an action for damages under the "taking" clause. *Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926); *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *Miller v. Schoene*, 276 U.S. 272 (1928).

Allowing speculative development rights to be considered property rights for Fifth Amendment purposes when they are not considered property rights under state law until they have vested, will place local governments in a legally anomalous and impossible position. They will be compelled either to recognize speculative development rights and permit a higher intensity use, even when they determine that the density is harmful to the community, or they will be compelled to purchase such development rights in order to prevent the developer from causing injurious impact to the community.

The absurdity of requiring such a choice to be made can be seen by its suggested effect on two recent court determinations.

In *Turner v. County of Del Norte*, 24 Cal.App.3d 311, 101 Cal.Rptr. 93 (1972), the County of Del Norte would either have had to purchase Turner's flood-prone land or would have been required not only to permit building on a flood plain subject to dangerous flooding, but to permit a metropolitan complex to be built near the Klamath River of sufficient density to cover the expense of raising Turner's land above flood plain level.

In *Kopetzke v. County of San Mateo Board of Supervisors*, 396 F.Supp. 1004 (N.D. California 1975), the Board of Supervisors would either have had to purchase hazardous fault-prone property or would have had to permit not only the sale of the hazardous, unstable land owned by Kopetzke, but also the building of the number of units required to insure correction of all the faults and hazards inherent in the land so as to make the property marketable.

If Appellant's strategy is successful, and the just compensation clause of the Fifth Amendment is expanded to include development potential, whether realistic or not, then the government will be required to compensate owners who seek to maximize their economic advantages in order to prevent them from doing harm to society. That is the ultimate conclusion of Appellants' argument.

VII

THE SPECULATIVE FAIR MARKET VALUE OF UNDEVELOPED LAND PROVIDES AN INFLATED MEASURE OF DAMAGES IN AN INVERSE CONDEMNATION ACTION.

Finally, where there is no existing economic use on the land (or a governmental determination as to reasonable use), economic injury based on fair market value creates a false measure of damages.

As this Court said in *Andrus v. Allard*, ... U.S. ...., 100 S.Ct. 318, 327 (1979);

> "Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. Further, perhaps because of its very uncertainty, the interests in anticipated gains has traditionally been viewed as less compelling than other property related interests."

Appellants, while they argue that they are entitled to compensation whether or not the regulation is reasonable,

paradoxically seek a measure of damages comparable to that provided in a tort action. If there has been no unreasonable action, there has been no wrong.

Even were the Court to recognize that a governmental regulation may, under some circumstances, give rise to an action in inverse condemnation, loss of potential development profits is an inappropriate measure of damages in any action arising under the just compensation clause.

VIII

CONCLUSION.

Appellants here have attempted by this action not only to bypass the land use approval process of local government and to eliminate public debate in the determination of land use decisions, but to substitute potential for profit for just compensation as the measure of damages in inverse condemnation.

Amici respectfully submit that the just compensation clause was never intended to force governments to make the kinds of choices proposed by Appellants. For all of the reasons that *amici* have stated, they urge the Court to affirm the decision below.

Respectfully submitted,

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